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NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF SOUTH DAKOTA, GEORGE S. MICKELSON, GOVERNOR, ROGER A. TELLINGHUISEN, ATTORNEY GENERAL, JIM JONES, SUPERINTENDENT, HIGHWAY PATROL, IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

ROSEBUD SIOUX TRIBE, CHEYENNE RIVER SIOUX TRIBE, OGLALA SIOUX TRIBE, STANDING ROCK SIOUX TRIBE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE STATE OF SOUTH DAKOTA SUCCESSFULLY ASSUMED EXCLUSIVE PUBLIC LAW 280 JURISDICTION OVER INDIANS ON ROADS THROUGH INDIAN COUNTRY IN 1961, WHEN THE JURISDICTION IT TOOK WAS PARTIAL, CONSISTENT WITH WASHINGTON V. CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION?

II

WHETHER THE 1968 AMENDMENTS TO PUBLIC LAW 280, WHICH EXPLICITLY PRESERVED ANY "CESSION" OF JURISDICTION PREVIOUSLY MADE UNDER PUBLIC LAW 280 DEPRIVED THE STATE OF SOUTH DAKOTA OF THE JURISDICTION IT TOOK IN 1961?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, State of South Dakota, George S. Mickelson, Governor, Roger A. Tellinghuisen, Attorney General, Jim Jones, Superintendent, Highway Patrol, in their official capacities, have been parties to this litigation from the beginning.

Petitioners will be referred to as the "State." Respondents, Rosebud Sioux Tribe, Cheyenne River Sioux Tribe, Oglala Sioux Tribe and Standing Rock Sioux Tribe, were parties to the litigation in both the district court and court of appeals. Respondents will be referred to as the "Tribes."

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in Rosebud Sioux Tribe, et al. v. State of South Dakota, et al., was reported at 900 F.2d 1164 (1990), and appears in the Appendix (A-1). The Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc was entered June 8, 1990, and appears in the Appendix (A-45). The opinion of United States District Court for the District of South Dakota, Central Division, is reported at 709 F.Supp. 1502, (D.S.D. 1989) and appears in the Appendix (A-47).

NO. _____

IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1990

STATE OF SOUTH DAKOTA, GEORGE S. MICKELSON, GOVERNOR, ROGER A. TELLINGHUISEN, ATTORNEY GENERAL, JIM JONES, SUPERINTENDENT, HIGHWAY PATROL, IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

ROSEBUD SIOUX TRIBE, CHEYENNE RIVER SIOUX TRIBE, OGLALA SIOUX TRIBE, STANDING ROCK SIOUX TRIBE,

Respondents.

JURISDICTIONAL STATEMENT

The Judgment of the United States Court of Appeals for the Eighth Circuit was dated and entered March 16, 1990. An "Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc" was entered on June 8, 1990. On August 28, 1990, Justice Blackman

granted an extension for the filing of a Petition for Writ of Certiorari up to and including November 5, 1990. This Petition was filed within that time limitation. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Public Law 280, 67 Stat. 588, §§ 6 and 7 as enacted Aug. 15, 1953.

> SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act. Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

SEC 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislation, obligate and bind the State to assumption thereof.

2. Act of Apr. 11, 1968, PL 90-284, Title IV, § 403, 82 Stat. 79, codified at 25 U.S.C. § 1323.

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of title 18 of the United States Code, section 1360 of title 28 of the United States Code, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

3. S.D. SL 1961, ch. 464, §§ 1, 4 codified at SDCL 1-1-18; 1-1-21.

> SDCL 1-1-18. The state of South Dakota, in accordance with the provisions of 67 Statutes at Large, page 589 (Public Law 280), hereby assumes and accepts jurisdiction of all criminal offenses and civil causes of action arising in the Indian country located within this state, as Indian country is defined by Title 18 United States Code, section 1151, and obligates and binds this state to the assumption thereof, the provisions of chapter 106 of the Session Laws of the state of South Dakota for 1901, as amended, or any other law of this state to the contrary, notwithstanding.
>
> SDCL 1-1-21. Except as to criminal offenses and civil causes of action arising on any highways, as the term is defined in chapter 31-1, the jurisdiction provided for in § 1-1-18 shall not be deemed assumed or accepted by this state, and §§ 1-1-18 and 1-1-20 shall not be considered in effect, unless and until the Governor of the state of South Dakota, if satisfied that the United States of America has made proper provision for the reimbursement to this state and its counties for the added costs in connection with the assumption of

> said jurisdiction, has issued his proper proclamation duly filed with the secretary of state declaring the said jurisdiction to be assumed and accepted.

STATEMENT OF THE CASE

In 1953, Congress enacted Public Law 280, 67 Stat. 588 (codified in part at 18 U.S.C. § 1162 and 28 U.S.C. § 1360). The first five sections of this enactment effected a mandatory transfer of jurisdiction from the tribes and the federal government over Indian country to the five named States. Sections 6 and 7 of PL 280 constituted an offer to other states to accept civil and criminal jurisdiction over areas of Indian country within the other states. In 1957, South Dakota made its first legislative response to the Congressional offer of jurisdiction. See, S.D. SL 1957, ch. 319 (codified at SDCL 1-1-12 through 1-1-16). These statutes set forth a conditional acceptance of civil and criminal jurisdiction

over Indian country, for it provided for a tribal referendum on the issue of acceptance of State jurisdiction by way of a referendum. All of the Tribes involved in this litigation voted not to accept State jurisdiction within their reservations.

In 1959, the State Legislature enacted S.D. SL 1959, ch. 144 (formally codified at SDC 1960 Supp. § 65.08101). See SDCL 1-1-17. By this statute, the State assumed concurrent police jurisdiction over roads on the reservation which were jointly maintained or established with the United States. In 1961, the Legislature enacted the acceptance of PL 280 jurisdiction which is at issue in this case. S.D. SL 1961, ch. 464, §§ 1, 4 (codified at SDCL 1-1-18 through 1-1-21). The State of South Dakota, by the 1961 Act, accepted jurisdiction over all "criminal offenses and civil causes of action arising on any highways." The acceptance also

allowed the Governor to issue a proclamation assuming all other jurisdiction with Indian country, but only if the Governor was satisfied that the United States had made "proper provision for reimbursement to the State and its counties for the added cost in connection with the assumption of said jurisdiction . . ." SDCL 1-1-21.

From 1961 to 1964, South Dakota did exercise criminal and civil jurisdiction over tribal members on highways in Indian country. In 1964, however, In re Hankins, 125 N.W.2d 839 (S.D. 1964), was decided. Hankins first found, correctly, that South Dakota's acceptance of PL 280 jurisdiction did not require amendment of the South Dakota Constitution, but that acceptance of such jurisdiction could be accomplished by legislation. See South Dakota Constitution, art. XXII, XXVI; In re Hankins, 125 N.W.2d at 841.

The South Dakota Supreme Court also found that Congress intended South Dakota to fall within the provisions of Section 6 of PL 280. In re Hankins, 125 N.W.2d at 842. Further, the Court found that Section 7 did not apply to South Dakota, and that Congress did not authorize states to assume only partial jurisdiction in Indian country. In re Hankins, 125 N.W.2d at 842-843. These findings were erroneous, as established later in Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 494-499 (1979).

In 1963, the Legislature enacted another statute, which took full, unconditional jurisdiction over all Indian country. See S.D. SL 1963, ch. 467; the statute, however, was referred to the voters and defeated and thus never became effective.

In 1968, Congress enacted, as a amendment to the controversial Civil Rights

Act of 1968, amendments to PL 280, which were known as the Indian Civil Rights Act of 1968. 25 U.S.C. § 1323(b) provided that Section 7, the provision of PL 280 which allowed for unilateral assumption of jurisdiction by the states, was hereby repealed; the same section also explicitly provided that the repeal "shall not affect any cession of jurisdiction made pursuant to said section prior to its repeal."

In 1988, the South Dakota Supreme Court decided State v. Onihan, 427 N.W.2d 865 (S.D. 1988), which, relying on Yakima, implicitly overruled Hankins, and specifically determined that South Dakota had successfully taken jurisdiction over Indians on highways in Indian country in 1961, and retained that jurisdiction to the present.

The present action was commenced in federal district court in 1986 by the Rosebud Sioux Tribe. Three other Tribes were allowed

to enter, by stipulation, at the district court level. Jurisdiction was alleged under 28 U.S.C. §§ 1331, 1343(3) and (4), 1337, 1362 and 42 U.S.C. § 1983. The decision of the district court was issued by Chief Judge Donald Porter on March 31, 1989. That decision found that the State of South Dakota had successfully assumed jurisdiction over Indians on highways through Indian country in 1961, and that this jurisdiction was not affected by the 1968 Civil Rights Act amendments. The Tribes filed a Notice of Appeal on April 26, 1989. The State filed a cross-appeal on May 5, 1989, contending that the jurisdiction it had taken was exclusive and not concurrent with the Tribes.

The Eighth Circuit Court of Appeals entered its decision on March 16, 1990. The Circuit Court of Appeals held that the State had not validly assumed jurisdiction in 1961; that the self-government of the Tribe had

become "vested," apparently by the passage of the 1968 amendment; and that it was improper to apply this Court's ruling in Yakima retroactively. The Court of Appeals, on June 8, 1990, denied rehearing and rehearing en banc, although four judges would have granted rehearing.

It should also be noted that, on September 4, 1990, the South Dakota Supreme Court, now relying on the federal law based decision of the Eighth Circuit in this litigation, essentially overruled Onihan, supra. See State v. Spotted Horse, No. 16644, slip op. (S.D. S.Ct. Sept. 4, 1990). The State, on October 29, 1990, filed a Petition for Rehearing and a Motion to be allowed Relief from Default to allow filing of the Petition.

REASONS FOR GRANTING THE WRIT

THE EIGHTH CIRCUIT COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW IN A WAY THAT CONFLICTS

WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. Introduction.

In 1961, the South Dakota Legislature assumed jurisdiction over Indians on highways through Indian country, S.D. SL 1961, ch. 464, §§ 1, 4, and the State exercised such jurisdiction until 1964 when its own supreme court decided that, as a matter of federal law, a state could not take partial jurisdiction over Indian reservations. In re Hankins, 125 N.W.2d 839 (S.D. 1964).

This Court, in 1979, however, in Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979), determined that a state could, consistent with PL 280, assume partial jurisdiction.

The issue now before the Court is whether the decision of this Court in Yakima will prevail in the State of South Dakota or

whether the earlier, erroneous decision of the South Dakota Supreme Court will be given effect.

The Eighth Circuit Court of Appeals, relying on incorrect notions regarding the effect of the 1968 amendments to PL 280 and ignoring the preservation by Congress of "cessions" of jurisdiction previously made, determined, in effect, that Hankins would be given effect and Yakima would not. The State comes before this Court asking that the Court give effect to Yakima and insure the uniform and national application of federal law, in particular PL 280.

The importance of the case lies not only in the misconstruction of this Court's opinions, as detailed below, but in the tangible result of depriving South Dakota of jurisdiction.

South Dakota's Indian reservations have a highway fatality rate far beyond that of

other state highways. For example, the ten-year averages show that Todd County, on the Rosebud Sioux Reservation, has a highway fatality rate three times that of the state average; Shannon County, on the Pine Ridge Reservation, has a fatality rate in excess of five times the state average. Affidavit of Pat Winters, dated Jan. 6, 1988. The exercise of law enforcement authority by the state on roads through the Indian reservations could, and the State believes would, have the effect of substantially lowering the fatality rate on Indian reservations to a level more consistent with that of the remainder of the State.

Finally, the opinion of the Eighth Circuit clearly puts at issue not only South Dakota's pre-1968 assumption of partial jurisdiction, but also that of Arizona, see Ariz. Rev. Stat. Ann. § 49-561 (air pollution only--water pollution repealed--no offer of

total jurisdiction); Montana, see Mont. Code Ann. §§ 2-1-301, 2-1-302 (criminal jurisdiction only over Flathead Reservation--county veto of full jurisdiction); and Iowa, see Iowa Code Ann. § 1.12-1.14 (civil only over Sac and Fox Indian settlement--no total jurisdiction offered).

B. The Eighth Circuit Court of Appeals misconstrued this Court's opinion in Washington v. Confederated Bands & Tribes of the Yakima Indian Nation when it found that the State of South Dakota could not assume jurisdiction only over highways under PL 280 as enacted in 1953.

In 1953, Congress modified the existing federal/state/tribal jurisdictional arrangements to allow states to unilaterally assume jurisdiction over Indians within Indian country. See Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 codified in part at 18 U.S.C. § 1162 (1988) (PL 280).

Section 7 of PL 280 provided that the State could:

> assume jurisdiction at such time and in such manner as the people of the state shall, by affirmative legislation, obligate and bind the state to assumption thereof.

This Court, in 1979, decided Yakima. As the Eighth Circuit stated correctly:

> Yakima ruled that the Washington jurisdiction statute validly assumed partial jurisdiction under the pre-1968 version of P.L. 280.

Rosebud Sioux Tribe, 900 F.2d at 1168.

Washington had assumed jurisdiction not only over highways through Indian country (the matter at issue here) but, in addition, over compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings and dependent children. Yakima, 439 U.S. at 465 n.1. The Washington statute provided that the state would take total jurisdiction should the Tribe request. The Washington tribes did not request the state to take jurisdiction and, in fact, resisted

the assumption of any jurisdiction by the state.

This Court in Yakima rejected the narrow view of the lower courts with regard to the partial assumption of PL 280 jurisdiction, stating:

> [T]he drafters [of PL 280] were primarily concerned with establishing a general transfer scheme that would facilitate, not impede, future action by other states willing to accept jurisdiction. It is clear that the all-or-nothing approach suggested by the tribe would impede even the most responsible and sensitive jurisdictional arrangements designed by the states.

Yakima, 439 U.S. at 497 (emphasis added).

Notwithstanding the clear direction of this Court in Yakima, the Court of Appeals erroneously held that the South Dakota could not assume partial jurisdiction, that is jurisdiction over Indians on highways through Indian country only, through PL 280, by way of its own statute enacted in 1961.

The Court of Appeals attempted to distinguish Yakima on the grounds that Washington had met the three "major concerns" motivating the passage of PL 280, while South Dakota had not. As stated in the decision of the Court of Appeals:

> The major concerns reflected in the passage of P.L. 280 were (1) to reduce the economic burden of federal jurisdiction over reservations, (2) to respond to a perceived hiatus in law enforcement on reservations, and (3) to assimilate Indians into the general population.

Rosebud Sioux Tribe, 900 F.2d at 1170 (citing Yakima, 439 U.S. at 498).

The Eighth Circuit found, therefore, that the assumption of jurisdiction over highways in South Dakota did little to "reduce the economic burden of federal jurisdiction over reservations since the federal government retains the financial burden of the majority of jurisdictional concerns." Rosebud Sioux Tribe, 900 F.2d at

1171. This conclusion is not correct. The ending of federal jurisdiction over highways means, of course, that vehicular homicide, manslaughter and similar prosecutions would not have to be undertaken by the United States Attorney, the federal courts would not be burdened with such cases, and federal prisons would not be burdened with these prisoners. Likewise, the substantial federal subsidy of tribal police departments to undertake jurisdiction of traffic offenses involving tribal members will not have to occur.[1]

The Court of Appeals also found that South Dakota's assumption of jurisdiction did

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[1]The federal subsidy of tribal police departments alone for traffic enforcement by three of the four Plaintiff Tribes is estimated at approximately $850,000. (Estimate of the State drawn from Answers to Interrogatories of three of four Plaintiff Tribes.)

not "respond to a perceived hiatus in law enforcement," the second Yakima factor, in that it did not "go very far in reducing lawlessness on reservations but simply introduced a third party to "the already complex jurisdiction pattern on reservations." Rosebud Sioux Tribe, 900 F.2d at 1170.

Again, the finding is neither helpful nor correct. Except for matters involving juvenile delinquency, the State of Washington took no more criminal jurisdiction than did South Dakota, yet this Court had no hesitation about finding its action consistent with PL 280 in Yakima.

Furthermore, the exercise of jurisdiction over Indians on roads through the reservations will, in fact, go a great distance toward reducing lawlessness, especially lawlessness which creates great danger to Indians and non-Indians alike. As

set forth above, the fatality rate for the reservation roads is two to five times the state average as evidence by the analysis of ten years of statistics. See Affidavit of Pat Winters.

Finally, South Dakota does not seek to introduce a "third party" to the reservation roads. As the Eighth Circuit must understand, South Dakota possesses and will continue to possess jurisdiction over non-Indians for certain offenses on the roads through reservations, regardless of the outcome of this litigation. See Solem v. Bartlett, 465 U.S. 463, 465 (1984); United States v. McBratney, 104 U.S. 621 (1892). (As to non-member Indians, see Duro v. Reina, ___ U.S. ___, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990)). By approving South Dakota's assumption of jurisdiction on roads through reservations, the role of the second and

third parties, i.e. the federal government and the Tribes, will be eliminated.

The Eighth Circuit apparently did agree agree that South Dakota's assumption of highway jurisdiction responded to the third concern of Yakima to "assimilate Indians to the general population." Rosebud Sioux Tribe, 900 F.2d at 1170. Indeed, South Dakota's assumption of jurisdiction was much less intrusive than that of Washington. Washington inserted itself into, for example, domestic relations and juvenile delinquency, adoption proceedings and dependent children, even though these concerns are at the heart of Indian culture. See, e.g., Indian Child Welfare Act, 1978, 25 U.S.C. § 1901-1963; Mississippi Bands of Choctaw Indians v. Holyfield, ___ U.S. ___, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). Thus, the concerns of Yakima regarding the purposes of PL 280 were

all easily met in terms of the Yakima case itself.

Finally, the Eighth Circuit Court of Appeals objected to South Dakota's assumption of jurisdiction because South Dakota did not simultaneously offer to take total jurisdiction over all Indian country and all Indians as did Washington. The Eighth Circuit apparently ignored the fact that South Dakota, just four years before the 1961 assumption of partial jurisdiction, had allowed each of the Tribes to veto any assumption of state jurisdiction under a previous PL 280 enactment, see S.D. SL 1957, ch. 319, and that all the Tribes did exercise just such a veto. The functional equivalent of the Washington arrangement was surely achieved. The Eighth Circuit Court of Appeals, therefore, takes a mechanistic view of this Court's decision in Yakima, apparently believing that only an arrangement

which precisely follows Washington's is satisfactory. What this Court found, of course, was that there would be "responsible and sensitive jurisdictional arrangements designed by the states." Yakima, 439 U.S. at 497 (emphasis added). This clearly leaves the door open for arrangements other than those designed by the State of Washington.

In sum, the Eighth Circuit Court of Appeals' decision is in direct conflict with Washington v. Yakima Indian Nation.

C. The Eighth Circuit Court wrongly determined in effect that the State could, prior to 1968, retrocede jurisdiction to the tribe and federal government by means of an erroneous state court decision.

As noted above, the South Dakota Legislature in 1961 assumed jurisdiction over Indians on highways through Indian country.

In 1964, the South Dakota Supreme Court, misreading federal law determined that a state legislature could not take partial

jurisdiction over Indian country. In re Hankins, 125 N.W.2d 839 (S.D. 1964). The state court Hankins decision was, in the State's view, proven wrong in Yakima in 1979. Nonetheless the Eighth Circuit opinion has in effect allowed the erroneous state court decision to control an important question of federal law rather than the later definitive decision of this Court in Yakima.

In Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 886 (1968), this Court said:

> As originally enacted, Pub. L. 280 plainly contemplated that, if States chose to extend state court jurisdiction over causes of action arising in Indian country, they would be required to honor that commitment, for the Act made no provision for States to return any jurisdiction to the United States.

Thus, South Dakota could not have deliberately surrendered jurisdiction to the United States prior to the enactment of the 1968 amendments because there was no

provision in the existing law to allow this action.

If South Dakota was not able, as a matter of federal law, to intentionally, through legislation, abandon highway jurisdiction, such result could certainly not occur by virtue of an erroneous state supreme court decision such as occurred in Hankins, as the Eighth Circuit in effect found.[2]

In sum, the decision of the Circuit Court both disregards the principal of stare decisis and the intent and effect of the supremacy clause of the United States constitution.

D. Section 7 of the Indian Civil Rights Act did not deprive South Dakota of

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[2]Of course, in 1968, Congress did provide, for the first time, for a mechanism for retrocession and for acceptance of retrocession. 25 U.S.C. § 1323(b). There is no claim of retrocession under this law; indeed, the Tribes have disclaimed any such argument.

jurisdiction when the language states that it did not affect "any cession" previously made.

In 1968, Congress amended PL 280 to require tribal consent to any future assumption of jurisdiction by the states. In so doing, Congress explicitly preserved "cessions" of jurisdiction already made to the states. The 1968 amendment flatly states that repeal of the relevant sections of PL 280:

> shall not affect any cession of jurisdiction made pursuant to said section prior to its repeal.

Act of Apr. 11, 1968, 82 Stat. 73, 79 (codified at 25 U.S.C. § 1323(b)).

The language of the Act is clear and unmistakable. If a "cession" had been made prior to the act, it was preserved.

In South Dakota's case, the "cession" had been accomplished by the federal government to the state in 1961 when the State Legislature adopted S.D. SL 1961,

ch. 464, which was effective on July 1, 1961. This act of cession was, therefore, on the face of 25 U.S.C. § 1323(b), preserved.

The opinion of the Court of Appeals ignores the language of Congress that the 1968 action did not "affect any cession of jurisdiction" made prior to 1968. Indeed, although this language has clear and direct application to South Dakota's situation, and even though it contains a term of law, i.e., "cession," the Eighth Circuit fails even to quote it.

Instead, the Court of Appeals engaged in a hunt for legislative history to justify ignoring the clear statutory language and to buttress its eventual finding about the "intent" of Congress in enacting the 1968 amendments to PL 280. When the language of Congress is clear and the plain meaning of statutes "is apparent," however, there need be no search of the legislative history.

See, e.g., Caminetti v. United States, 243 U.S. 470, 485 (1917).

Moreover, the Circuit Court's digression violates the analytical structure of Yakima itself. An issue in Yakima was whether the State of Washington was required to amend its constitution before assuming any PL 280 jurisdiction under the 1953 act. A congressman from Washington stated in committee that Washington did, in fact, have a "constitution there that requires this amendment in order that they can get at this." See Brief for the United States as Amicus Curiae, Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, No. 77-388 at 26 (quoting H.R. Rep. No. 848, 83d Cong., 1st Sess. at 26 (1953)). The Senate sponsor of the Bill, Senator Case, agreed on the record. Id. at 28 (citing 99 Cong. Rec. 10782 (1953)). Nonetheless, this Court found:

> While some committee members apparently thought that Section 6 states, as a matter of state law, would have to amend their constitutions in order to remove the disclaimer found there, there is no indication that the committee intended to impose any such requirement.

Washington v. Yakima Indian Nation, 439 U.S. at 492-493.

This Court has thus warned the lower courts of the vice of relying upon isolated statements of congressmen, even congressmen from the directly affected state, as setting the national policy with regard to the interpretation of PL 280. Yet, that is exactly what the Eighth Circuit did here.

More particularly, the Eighth Circuit Court of Appeals relied upon a statement of a congressman who was, indeed, not even a sponsor of the bill, Congressman Reifel. This statement is worth even less than that of the Washington congressman because the committee statement of Reifel does not even

directly address the issue of whether South Dakota had successfully assumed partial jurisdiction in 1961. A fair reading of the statement relied upon indicates that it speaks only of action of the South Dakota Legislature in 1963 taking total jurisdiction, and the subsequent action of the electorate in 1964 overturning the 1963 Act, and not the 1961 assumption of partial jurisdiction. See Hearings on H.R. Res. 1100 Before the Committee on Rules of the House of Representatives, 90th Cong., 2d Sess. Part 2, 35-36 (1968). In fact, Congressman Reifel did not even mention the assumption of partial jurisdiction in 1961.

It was therefore singularly inappropriate for the Court of Appeals to give weight to this statement for not only does it not demonstrate the intention of Congress, it does not even demonstrate the

perception of Congressman Reifel itself as to the issue now before the Court.[3]

The State concludes that the Circuit Court committed clear error when it declined to give effect to the plain words of Section 7 of the 1968 amendments explicitly preserving prior "cessions" of jurisdiction to the states, and instead relied upon flimsy

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[3]The court also cited a statement of a South Dakota Assistant Attorney General made before a congressional committee in 1965, three years before passage of the bill in question. The comment was never made a part of any official report. See Rosebud Sioux Tribe, 900 F.2d at 1171. It is also of at least passing historical interest the Indian Civil Rights Act was, essentially, tacked on to another civil rights bill to which still another civil rights amendment had been added. See ____ Cong. Rec. 9566 (Apr. 10, 1968). On the day Reifel made the statement relief upon by the Eighth Circuit, Dr. Martin Luther King was assassinated. Six days later, when the nation was enduring riots and when troops were stationed "throughout and around the Capitol Building," the statute was passed. See ____ Cong. Rec. 9566 (Apr. 10, 1968).

legislative history to fashion an elusive congressional "intent."

E. The Eighth Circuit Court of Appeals misconstrued the retroactivity decisions of this Court and thus disrupted the uniform application of federal law on a permanent basis.

The "usual rule" is that decisions of this Court on federal law issues are retroactive. See Goodman v. Lukens Steel Co., 482 U.S. 656, 662 (1987).

Departures from this rule are appropriately countenanced only to protect private rights. Thus, for example, in Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), this Court held that a determination of a statute's unconstitutionality would not be applied retroactively so as to deprive bond holders of their rights. At the same time, the ultimate decision regarding unconstitutionality of the statute was not itself affected. See also Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

The clear direction of this Court, the State suggests, is set out in United States v. Estate of Donnelly, 397 U.S. 286, 294 (1970), in which this Court stated:

> Acts of Congress are generally to be applied uniformly throughout the country from the date of their effectiveness onward. . . . Deviant rulings by circuit courts of appeals [and, the State suggests, state supreme courts] cannot generally provide the 'justified reliance' necessary to warrant withholding retroapplication of a decision construing a statute as Congress intended it. In rare cases, decisions construing federal statutes might be denied full retroactivity, as for instance when this Court overrules its own construction of a statute . . .

See also Chesapeake and Ohio Railway Co. v. Martin, 283 U.S. 209 (1931). Despite this direction, the Court of Appeals nonetheless refused to apply this Court's decision in Washington v. Yakima Indian Nation, supra, retroactively. In essence, the Court of Appeals has allowed the erroneous state court

decision in Hankins in 1964 to control over this Court's decision in Yakima in 1979.

Moreover, contrary to the rule of this Court, the question here (1) disrupts the uniform application of federal law, and (2) does so on a permanent basis, thus permanently and erroneously allocating power between the States and the Tribes.

The Eighth Circuit Court of Appeals, in refusing to grant retroactivity to Yakima, stated that to do so would disturb the "vested rights" of the parties, would frustrate the "justifiable expectations of the parties," and that further, it would be "inequitable" to do so.

Of course the only "vested" right at issue is that of the State of South Dakota. As set forth above, Section 7 of the 1968 Indian Civil Rights Act preserved "cessions" of jurisdiction made prior to 1968. Because South Dakota had been the recipient of such

"cession," Congress unambiguously "vested" that right in the State in 1968.

The grounds for the purported "vested right" of the Tribes are, in contrast, exceedingly vague. The Eighth Circuit's opinion admits that there is "no vested right to a judicial decision." Rosebud Sioux Tribe, 900 F.2d at 1173 (citing United States v. Estate of Donnelly, 397 U.S. 286, 295 (1970)). This is especially true, the State submits, of an erroneous judicial decision.

While denying that the purported "vested right" of the Tribes flows from the erroneous Hankins decision, the Circuit Court nonetheless argues that such a right flows "from the change in Congress' offer of jurisdiction to the states." Rosebud Sioux Tribe, 900 F.2d at 1173. This surely is bootstrapping. In the absence of Hankins, there would have been no grounds whatsoever for the Eighth Circuit's decision.

Moreover, contrary to the view of the Circuit Court, the Tribes do not have a "justifiable expectation" protectable by federal law in the erroneous decision of the South Dakota Supreme Court in Hankins. It will be recalled that Hankins was decided in 1964. The Yakima case was decided in 1979. The very next year, South Dakota argued the applicability of Yakima in a case which was ultimately decided upon a different issue.

Whatever the "justifiable expectation" doctrine is, it does not protect expectations built up over a mere fifteen-year period in which a state government merely declines to defy the courts. The case is thus markedly distinguishable from those cited by the Eighth Circuit Court of Appeals. (There was, for example, a seventy-year period relied upon in Rosebud Sioux Tribe v. Kneip, 439 U.S. 584 (1977).)

The Eighth Circuit further appeared to argue that it is simply not "equitable" to give this Court's Yakima decision retroactive effect. See Rosebud Sioux Tribe, 900 F.2d at 1173. The decisive point with regard to "equitability," however, is that the fatality rate on reservation highways far exceeds that on non-reservation highways in the State. The ten-year fatality rate in Todd County of the Rosebud Reservation is over three times the state average; the ten-year fatality rate in Shannon County of the Pine Ridge Reservation is over the five times the state average. Affidavit of Pat Winters, dated Jan. 6, 1988. Likewise, in examining the equation it should be remembered that the jurisdiction taken by the State was limited. Only jurisdiction over highways was taken. The jurisdiction taken does not go to the heart of the tribal culture or way of life, but rather provides protection for Indians

and non-Indians alike on reservation highways. The opinion of the Eighth Circuit Court of Appeals appears to take the view that any assumption of jurisdiction is crippling to the Tribes, a stance clearly not supported by any evidence nor by Yakima itself. Surely it is not "inequitable" to give retroactive application to the decisions of this Court to provide for the safety of roads on the reservations, while preserving the heart of Indian culture and way of life.

The State submits that this Court should review the failure of the Eighth Circuit to grant retroactivity to this Court's decision in Yakima.

F. The state's assumption of jurisdiction in 1961 over Indians on highways in Indian country was exclusive and not concurrent.

The district court found that South Dakota's assumption of jurisdiction over highways was concurrent with the Tribes and

not exclusive. The Eighth Circuit Court of Appeals essentially did not rule directly on that point, for it found that the State had no jurisdiction over Indians on highways on the reservations. See Rosebud Sioux Tribe, 900 F.2d at 1171 n.12.

The issue, therefore, is whether the State's assumption of jurisdiction in 1961 was exclusive of tribal and federal jurisdiction, or was concurrent with the Tribe and the State.

First, PL 280 allowed the State to take civil and criminal jurisdiction "at such time and in such manner as the State" determined. South Dakota clearly intended to take all highway jurisdiction. See S.D. SL 1961, ch. 464, § 1, stating that jurisdiction was taken of "all" criminal and civil causes of action.

Second, assumption of exclusive jurisdiction is consistent with the three

main purposes of PL 280, which were: (1) to reduce the economic burden of federal jurisdiction over reservations, (2) to respond to a perceived hiatus in law enforcement on reservations, and (3) to assimilate Indians into the general population. Rosebud Sioux Tribe, 900 F.2d at 1170 (citing Yakima, 439 U.S. at 498).

It is clear beyond any argument that the assumption of exclusive rather than concurrent jurisdiction would clearly reduce the economic burden on the United States. Clearly, if concurrent jurisdiction exists, the United States will remain responsible for substantial highway expenditures, either in its own behalf or by way of the subsidization of tribal police departments for operation on highways through reservations.

Second, the law enforcement hiatus is more effectively addressed by exclusive jurisdiction because allowing concurrent

tribal enforcement simply introduces a possibility of conflict between the State and the Tribes, and produces a "complex jurisdictional pattern on reservations," Rosebud Sioux Tribe, 900 F.2d at 1170 (footnote omitted), where it is simply unnecessary to do so. Finally, by eliminating conflicts with regard to jurisdiction on the roads, the policy of assimilation is more easily accomplished.

It is of note that the legislative history of PL 280 supports the thesis that Congress intended jurisdiction to be taken by the State to be exclusive. The committee discussion classified the jurisdiction that the states were to take as "exclusive." See Hearings on H.R. 1063 Before the Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. at 107 (July 15, 1953). Critically the discussion of the same committee indicated directly that the jurisdiction of the Indian

tribes themselves was to be affected. Certain tribes expressed a desire to retain jurisdiction and to maintain their own law and order systems after the passage of PL 280. An exception was made for these tribes. When the committee discussed the matter, it was recognized that the tribes which were not included within any exception would not be able to maintain their own law and order system. Counsel for the committee stated:

> I do not think it would require any [adjustments], except in the short title of the bill, provided that Congress were agreeable to keeping in the provisions for those exceptions which this bill reflects for those states where certain Indian tribes wish not to have a cession of civil and criminal jurisdiction to the state but to maintain their own law and order system.

1953 Hearings on H.R. 1063 Before the Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. at 96 (June 29, 1953)

(emphasis added). At this point Congressman D'Ewart asked if a list of states was available to which the law would be applicable. Counsel replied, naming certain states, then saying:

> In Oregon there is a recommendation for Warm Springs, in Minnesota for Red Lake; in Wisconsin for Menominee, and in Nebraska, as in the case of California and Nevada, there would be no reservation which the Department would recommend be held out as one permitted to administer its own law and order system.

Id. at 97 (emphasis added).

The committee thus recognized that if a particular tribe was not named as an exception it would not be permitted to "administer its own law and order system" after enactment of PL 280. Finally, the legislative history, by referring to such matters as "school truancy laws [which] do not apply on any reservations," id. at 100, indicates that the tribe was not to retain

any jurisdiction. Congress wanted to give the states the authority to compel children to go to school and was concerned about the possibility of inconsistent tribal legislation. To overcome any such problem, Congress intended state jurisdiction to be exclusive of tribal jurisdiction to facilitate elimination of this and similar problems of enforcement of civil and criminal laws.[4]

In sum, South Dakota intended and Congress allowed the State to assume exclusive, rather than merely concurrent,

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[4] See also H.R. Rep. No. 91-1545, reprinted at 1970 U.S. Code Cong. and Leg. News 4783, 4786, which explicitly recognized that no jurisdiction was retained in the tribes when jurisdiction was assumed under PL 280; S. Rep. No. 95-719, 95th Cong., 2d Sess., reprinted at 1978 U.S. Code Cong. and Ad. News 1761, 1767, which establishes that the Pascua Yaqui Tribe was to be treated as a PL 280 tribe and also that it was to have no civil or criminal jurisdiction.

jurisdiction over civil and criminal causes of action arising on highways through Indian country under PL 280 and South Dakota's implementation of PL 280 in 1961.

CONCLUSION

This Court, in the Yakima case, found that a state could assume partial jurisdiction over Indian country, and in particular, that a state could assume jurisdiction over highways through Indian reservations. The Eighth Circuit Court of Appeals has declined to give retroactive effect to that decision and, in effect, has declared that the erroneous decision of the South Dakota Supreme Court in 1964 sets the boundaries of federal law and permanently allocates power between the Tribes and the State, despite the intervening decision of the United States Supreme Court. This case presents an important question of federal/tribal/state relations and should be

addressed by this Court. The State of South Dakota respectfully requests that this Petition for Writ of Certiorari be granted.